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Supreme Court, U.S.
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No. 99-1560

IN THE
SUPREME COURT OF THE UNITED STATES

INTERNATIONAL PRECIOUS METALS CORPORATION, MULTIVEST, INC., JAMES GROSFELD, Individually and as Trustee of the Jason Grosfeld Trust, MULTIVEST REAL ESTATE, INC., S.S. MELBOURNE, INC., and THE CYPRESS GROUP, INC.,
Petitioners,
vs.
WILLIAM WATERS AND LINDA BARTHOLOMEW, individually and on behalf of all those similarly situated,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' OPPOSITION TO MOTION OF AMICI CURIAE TO FILE BRIEF IN SUPPORT OF PETITION

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May 2, 2000

TABLE OF AUTHORITIES

FEDERAL CASES

American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh,
699 F.2d 644 (3d Cir. 1983) 1

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Ryan v. Commodity Futures Trading Commission,
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Strasser v. Doorley,
432 F.2d 567 (1st Cir. 1970) 1

Respondents (plaintiffs below) hereby oppose the motion of amici curiae (Lester Brickman, George Cohen, Merritt Fox, Susan Koniak and Thomas Rowe) for leave to file a brief in support of petitioners (defendants below). Rule 37.2(b) expressly states that these types of motions are "not favored." Moreover, amici curiae fail to demonstrate in their motion any of the requirements under which courts have found it proper to consider an amicus curiae brief. They have not demonstrated that they have an interest in any other case which will be affected by the decision in this case. Nor have they shown that petitioners lack competent counsel. *See, e.g., Northern Securities Co. v. United States*, 191 U.S. 555, 556 (1903) ("It does not appear that applicant is interested in any other case which will be affected by the decision of this case; as the parties are represented by competent counsel, the need of assistance cannot be assumed; and consent has not been given. Leave to file must, therefore, be denied."); *American College of Obstetricians and Gynecologists, Pennsylvania Section v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (denying motion of law professors for leave to file amici curiae brief, noting that the law professors "do not purport to represent any individual or organization with a legally cognizable interest in the subject matter at issue").

Moreover, the proposed brief submitted by amici curiae goes far beyond commenting on the legal issues raised by the petition; the brief parrots factual misrepresentations and distortions contained in petitioners' brief -- representations which were soundly rejected as "not credible" by both the District Court and the Eleventh Circuit. "[A]n amicus who argues facts should rarely be welcomed." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970). Amici curiae's slavish adherence to these

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factual distortions and petitioners' themes demonstrates that they are merely being used as a shill for petitioners -- who, as noted by the Eleventh Circuit, are not seeking to benefit the class but are in reality seeking to obtain a reversion for themselves of 90 cents of every dollar they ask the Court to cut from class counsel's fee award.

Petitioners apparently hope, through the use of these amici curiae, to give "credibility" to assertions which the District Court found were "not credible" (Petitioners' Appendix at S-4) and which the Eleventh Circuit found "strained credulity." (*Id.* at A-13) Petitioners also apparently hope through the use of these amici curiae to extend the page limits to which they are entitled. As Judge Posner of the Seventh Circuit has noted, these types of amici briefs are "an abuse":

> The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made by the litigants' briefs, in effect merely extending the length of the litigant's brief. *Such amicus briefs should not allowed. They are an abuse*. The term "amicus curiae" means friend of the court, not friend of a party. [Citations omitted] We are beyond the original meaning now; an adversary role of amicus curiae has become accepted. [Citations omitted] But there are, or at least there should be, limits. [Citations omitted] An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. [Citation omitted] Otherwise, leave to file an amicus curiae brief should be denied.

Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1060, 1063 (7th Cir. 1997) (emphasis added).

Amici's rote mimicking of petitioners' factual (not just legal) themes rejected by the District Court and the Eleventh Circuit demonstrates that their brief is a device of petitioners. In ruling on this motion, the Court should know that:

1. Respondents' counsel spoke with several of the amici curiae on April 19, 2000, just days before the amicus brief was due. Although counsel for amici curiae were then preparing this amicus brief, the amici had not yet been provided with basic information about the case, including respondents' brief from below and the amicus curiae brief filed below on behalf of respondents by the American Association of Retired Persons ("AARP"). Nor had amici even been provided with the final order of the District Court below (the order appealed from) or the District Court's findings of fact with respect to the fee award at issue. The briefs were sent to amici only after we asked amici's counsel to send them. *See* Exhibits A-C hereto.[1] One of the amici then asked us to supply him with the District Court's final order and findings of fact, which he did not receive until April 20, two business days before amici filed their brief.

2. Although amici had little time to review these very limited record materials prior to the filing of their brief, their brief simply accepts as true factual (not legal) conclusions set forth in petitioners' brief -- conclusions which were specifically rejected by the District Court as "not credible." Compare, for example, amici's assertion concerning the results of the NERA study of fee awards (Amici brief at p. 12 n. 10) with the District Court's final order rejecting petitioners' characterization of that study as

[1] Respondents' counsel also spoke with three additional law professors (from Yale, Stanford and NYU) identified by amici's counsel as additional amici in order to arrange to send them relevant material. These professors decided not to participate as amici.

being "not credible." (*See* District Court's May 8, 1997 Order in Petitioners' Appendix at S-4)

3. Petitioners' brief suggests that adopting petitioners' position will serve the interests of the class. Both the District Court and the Eleventh Circuit flatly rejected this notion noting that petitioners are seeking to obtain *for themselves*, through the reversionary feature of the settlement, 90% of any amounts that the Court cuts from class counsel's fee award. Indeed, the Eleventh Circuit found that petitioners' position "strains credulity." (*See* Eleventh Circuit's opinion in Petitioner's Appendix at A-13)

4. Amici's brief suggests without record support that class counsel somehow traded away the rights of class members in order to obtain a larger fee for themselves. The District Court and the Eleventh Circuit flatly rejected this accusation noting "that the settlement plainly is not collusive in any respect," and that it was instead "an agreement concluded after arms-length negotiations." (*See* Petitioner's Appendix at A-5, n. 4, A-17; Respondents' Appendix at 73a)

5. Amici's brief falsely suggests that the District Court did not take the actual number of claims into account in determining a reasonable fee "because it understood that a prior decision of this Court prohibited it from doing so." (*See* 2d unnumbered page of amici's motion) To the contrary, the District Court, and the Eleventh Circuit, noted that this Court's *Boeing* decision permits, but does not require, a district court to consider the gross amount of the settlement fund (and not just amounts claimed by class members from the fund) in setting an appropriate fee. (*See* Petitioners' Appendix at A-13) The District Court noted that virtually all of the relevant fee determination factors, including

the length and intensity of the litigation, the risk assumed by class counsel, the public policy that class counsel served by pursuing the owners of a telemarketing boiler room that had been shut down by the CFTC for massive sales fraud, all necessitated an upward adjustment in the benchmark fee. (Petitioners' Appendix at S-6-7; Respondents' Appendix at 93a-101a) The Eleventh Circuit also noted that the fee actually awarded represented a "modest multiplier" of barely 1.05 on class counsel's actual lodestar invested in this case through seven years of litigation and five months of jury trial. (Petitioners' Appendix at A-13) The courts below rejected the notion that class counsel after taking this enormous risk, and making this enormous investment, should be forced to suffer a multimillion dollar loss, just so petitioners could receive a reversion of 90% of the fee the District Court awarded class counsel. (Respondents' Appendix at 91a-92a) Moreover, the District Court found that the failure of class members to file claims against the fund was in large part attributable to petitioners who "engaged in litigation tactics that substantially prolonged the case." (District Court's May 8, 1997 Order in Petitioner's Appendix at S-6) As the District Court summarized: "To allow the Defendants to succeed in taking the position they advocate at this point in time would, in effect, reward them for prolonging the litigation in anticipation that the longer the litigation went on, the greater the likelihood that the number of class members who could be located and who would submit claims would decrease." (*Id.*)

6. In their zeal to side with petitioners on issues of fact, amici go so far as to suggest there was no support for class counsel's lodestar. (Amici brief at p. 4 n. 2) Even petitioners raised no serious challenge to respondents' lodestar figure submitted in the

District Court. Petitioners did, however, challenge respondents' cost bill and the District Court, therefore, ordered petitioners to disclose their own costs for sake of comparison. Those costs were 63% greater than those awarded to class counsel, strongly suggesting that amounts expended by petitioners in this seven year litigation similarly exceeded those of respondents by a substantial margin. (Respondents' Appendix at 253a-254a) The District Court also noted that petitioners had thrown "massive manpower" into this case, to the point where "as many as 30 lawyers for the defense [were] working on the case at any one point in time." (Respondents' Appendix at 70a) The District Court further noted that "for over six years a relatively small group of California lawyers had been battling a fairly large group of defense lawyers in a tenacious effort to bring this case to an conclusion in Miami, Florida." (*Id.* at 71a) Amici's efforts to dispute previously undisputed facts -- such as the amount of respondents' lodestar -- again demonstrates they are acting as friends of petitioners, not friends of the Court.

7. Amici's brief suggests that class counsel had no incentive to ensure that class members would file claims. In speculating about class counsel's psyche, amici simply ignore the actual record evidence. The District Court found that class counsel, even after preliminary approval of the settlement, continued vigorously to protect the interests of class members by, among other things, obtaining a court order requiring the settlement administrator to use an expensive address locator service to update the addresses of class members whose claim packets were returned by the postal service. (Respondents' Appendix at 46a) Petitioners had opposed these efforts in order to increase their reversion requiring the Court's intervention. Additionally, respondents are

currently fighting -- at their own expense -- another of petitioners' appeals still pending in the Eleventh Circuit, wherein petitioners are seeking to overturn a District Court order allowing certain class members' claims. (*See* Respondents' Brief at 10 & n. 4)

8. Amici's brief states that the "parties doubtless expected" that only a fraction of class members would actually file claims. (Amici Brief at 5) Again, this type of flippant mimicking by amici of petitioners' brief -- without a shred of factual support -- is as improper as it is regrettable. The actual evidence is to the contrary. (*See* Respondents' Appendix at 154a)

9. Amici's brief suggests that the $40 million settlement fund was "illusory," even though the District Court and the Eleventh Circuit rejected that notion. (*See* Petitioners' Appendix at A-9, A-12)

10. Amici's brief also parrots the refrain which petitioners have been making throughout this litigation -- namely that the District Court improperly certified a "churning" claim. (Amici Brief at 11) The mere fact that amici curiae would insert this gratuitous remark in their brief -- when it has no bearing whatsoever on the issues they raise -- tells all. More importantly, it is patently absurd based on the facts of this case. The CFTC does not seek a permanent injunction closing a commodities firm because a few salespersons are "churning" accounts; the CFTC sued petitioners' company and put it out of business because petitioners were supervising and training salespeople to cheat customers. That is why rules of the National Futures Association ("NFA") still require strict supervision of salespersons formerly associated with petitioners' company. (Respondents' Appendix at 305a-313a)

11. Amici's brief suggests that class counsel could have negotiated a better settlement for the class if they had not been looking out for their own interest. And yet, class counsel settled only after seven years of litigation and on the eve of verdict following a five-month jury trial. Even if class counsel had rejected the settlement at issue and proceeded to a plaintiffs' verdict, class members would have received nothing for years -- if at all. The District Court noted this fact in approving the settlement commenting: "That [the court] had agreed that in the event of a plaintiffs' verdict [it] would authorize the defendants to take an interlocutory appeal before proceeding with the case further, let alone to judgment, because there were additional proceedings that were necessary in order to determine whether the plaintiffs were entitled to anything at all even after this trial." (Respondents' Appendix at 69a) The District Court went on to note that because of the complexity and novelty of the issues, it would have taken "three to four years to conclude the appellate proceedings stemming from the trial and then possibly additional time, if the plaintiffs prevailed on appeal, and possibly another appeal, to resolve the remaining issues in the case and enter a judgment." (*Id.*) Unless class counsel prevailed in each of those proceedings, the class would have received nothing; and even if class counsel had prevailed in each of those proceedings, additional years would have passed leading to further dissipation of the class and a decrease in likely claims against any settlement or judgment fund. Amici's ivory tower speculation about what "could" have been done is wholly divorced from the factual findings of the District Court, thoroughly reviewed and unanimously affirmed by the Eleventh Circuit. In short, amici improperly push petitioner's factual assertions, leading them to the conclusion that

although class counsel spent seven years of litigation and millions of dollars of investment to recover millions for the class, class counsel should suffer a multimillion dollar loss for their efforts so the boiler room owner can get a reversion of 90% of the fees. Compare this outcome with amici's professed interest in "deterrence." (*See* Amici Brief at 13)

These types of bald factual assertions and innuendo detached from the record evidence have no place in a proper amicus curiae brief. Their inclusion in this brief (especially in light of the fact that amici apparently had not even begun to review the relevant briefs and record below until days before the brief was filed, and then only after respondents urged at least this minimal inquiry) strongly indicate that amici curiae are being used as a "mouthpiece" for petitioners.

Amici's further suggestion that they should be permitted to file a brief in this Court because the AARP filed an amicus brief in support of respondents below is wholly unfounded. The AARP, as the nation's largest lobby group representing the interests of older American consumers, clearly had an immediate and concrete interest in the outcome of this case that recovered millions of dollars from the owners of a telemarketing boiler room that was shut down by the CFTC after bilking consumers of virtually all their invested capital. Many of the AARP's members are members of the class. Further, the AARP did not distort or invent facts rejected by the District Court; it accepted the District Court's factual findings and made arguments concerning the law. (*See* Respondents' Appendix at 168a-199a) Moreover, that the AARP, whose mission it is to protect the types of class members involved in this case, filed an amicus brief *supporting* the fee

award strongly indicates that it is respondents, not petitioners, who have been fighting to uphold the class members' interests in this litigation. An amicus brief supporting a position different from that which the Court might initially expect is of much more significance that an amicus brief which adopts a predictable position and does nothing more than repeat the arguments in the brief of the party it supports.

For the above stated reasons, respondents respectfully request that the Court deny the motion of amici curiae for leave to file a brief in support of petitioners.

Respectfully Submitted

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CERTIFICATE OF SERVICE

This is to certify that I served a copy of the attached:

RESPONDENTS' OPPOSITION TO MOTION OF AMICI CURIAE TO FILE BRIEF IN SUPPORT OF PETITION

upon the parties listed below by causing a copy of the same to be delivered via First Class United States Mail, addressed as follows:

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Steven M. Edwards, Esq.
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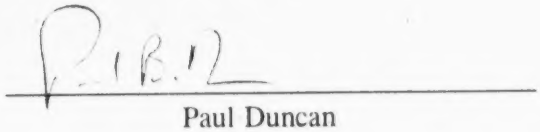
I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed in San Francisco, California on May 2, 2000.



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April 18, 2000

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International Precious Metals v. Waters

Dear Mr. Goteiner:

As I mentioned in our telephone conversation earlier today, we are writing an amicus curiae brief on behalf of certain law professors in support of the petition. The Amici are Lester Brickman of Cardozo Law School, George Cohen of the University of Virginia Law School, Merritt Fox of the University of Michigan Law School, Joseph Grundfest of Stanford University Law School (who may drop out because of time constraints), Susan Koniak of Boston University Law School, Geoffery Miller of N.Y.U. Law School and Thomas Rowe of Duke University Law School. The Amici will essentially contend that the district court erred in awarding attorneys' fees without determining whether they bore a reasonable relationship to the recovery actually paid to the class.

Pursuant to Supreme Court Rule 37.2, we are seeking consent of Respondents to the filing of this brief. Petitioners have already consented. Rule 37.2(a) requires that such consent be in writing.

Given our time constraints, we would appreciate hearing from you by the end of the day tomorrow, April 19. If we do not hear from you by then, we will assume that consent has been withheld. At your suggestion, I am forwarding the briefs in the Eleventh Circuit to all Amici.

Sincerely yours,

Steven M. Edwards

Via Federal Express and Facsimile

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April 18, 2000

VIA FACSIMILE

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Re: Waters

Dear Mr. Edwards:

Thank you for your April 18 letter. Either I or Brandon Wisoff will attempt to tell you by the end of the day tomorrow whether plaintiffs will consent to you filing your amicus brief.

Regarding contacting the amici, you admonished me today that you were "in essence" their attorney and suggested that accordingly I should not be contacting them. I asked you to confirm your attorney-client relationship in writing. You did not suggest in your April 18 letter, however, that you had any such relationship. We are therefore proceeding under the assumption that you are not in fact the attorney for any of the amici. Indeed, it seems from your most-recent silence on that point (as well as your additional comments today) that you yourself are not a true amici but are in fact allied with Mr. Grosfeld and/or his counsel in something very different than a proper amici relationship. I trust you will follow the Court's rules in making all appropriate disclosures of that relationship.

In any case, I also trust that you are sending the amici at least both class counsels' and the AARP's briefs before the Eleventh Circuit. It is startling to me that any of these "amici" could begin to state any properly informed view without having had access to this briefing and relevant parts of the underlying record.

On the off-chance, however, that you might have any duty of full disclosure to the amici, I urge you to inform all of them of the issues we discussed today regarding defendants'

assertions before the Eleventh Circuit and Supreme Court, as well as a full summary of the record that bears directly on the contention that you describe will be the amici's position before the Supreme Court.

Very truly yours,

NEIL A. GOTEINER/GMG

Neil A. Goteiner
DICTATED BUT NOT READ

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International Precious Metals v. Waters

Dear Mr. Goteiner:

I write in response to your letter of April 18, 2000.

For clarity, I told you that I was "in a sense" counsel to the Amici and asked you to hold off on contacting them until I had a chance to ascertain whether they wanted to be contacted. You told me that you intended to disregard my request, so I did not think it necessary to address the issue in my letter to you yesterday. As things stand, some of the Amici are willing to talk to you and some are not interested; but rather than my stating the position of each on an individual basis, it is probably more efficient for each of them to adopt their own position if and when you call.

At your request, I have sent the Amici the briefs that were filed in the Eleventh Circuit, including the AARP's brief, and have offered to provide them any additional information they need. With respect to the innuendo in your letter concerning the propriety of my conduct, suffice it to say you are wrong. You have no basis for suggesting that (a) either I or the Amici are involved in "something very different than a proper amici relationship"; (b) there is a risk that I will not obey the Supreme Court's rules; or (c) that amici need to study the entire factual record of a case in order to take a position on a question of law.

Sincerely yours,

Steven M. Edwards

Via Facsimile

BEST AVAILABLE COPY